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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1114

KATHERINE ANN ARKEY, PETITIONER

v.

THE STATE OF OHIO, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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February 12, 1968

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Petitioner, KATHERINE ANN ARKEY, respectfully petitions that a Writ of Certiorari issue to review a judgment of the Supreme Court of Ohio, affirming a judgment of the Court of Appeals of Cuyahoga County, sustaining the Cuyahoga County Common Pleas Court, over-ruling petitioner's Motion to Withdraw her plea of guilty to first degree manslaughter and to enter a plea of not guilty.

OPINIONS

There were no reported or other formal opinions in the courts below.

JURISDICTION

This Court's jurisdiction is based on 28 U.S.C. § 1254(1) and on this Court's Rule 22(1).

The Supreme Court of Ohio rendered its judgment November 15, 1967. This Petition for Certiorari was filed within ninety days (90) of that date. Petitioner simultaneously filed her Motion to Dispense Printing and for Leave to Proceed with typewritten copies.

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QUESTIONS PRESENTED

1. Whether a plea of guilty to the commission of a felony, entered by a defendant while under the coercive persuasion of a serious domestic dilemma is such a free and unqualified admission of guilt as to constitute a waiver of constitutional rights to a trial.

2. Whether a defendant who has entered a plea of guilty to the commission of a felony while under such coercion, has the right, eleven days before sentence, to withdraw her guilty plea and to enter a plea of not guilty.

3. Whether a defendant, represented by counsel and properly admonished by the Court enters a plea of guilty, not as an admission of guilt but as the choice of the horn of her dilemma upon which she chooses to be impaled, the representation by counsel and admonition of the Court alleviates the coercion that impelled the plea and whether such plea was indeed a waiver of her constitutional rights to a trial.

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the United States Constitution that apply, are as follows:

1. Article 3, Section 2

> "... trial of all crimes, except in cases of impeachment, shall be by jury; such trials shall be held in the State where the said crimes shall have been committed..."

2. Fifth Amendment, Due Process Clause

> "...be deprived of life, liberty or property, without due process of law; ..."

3. Sixth Admendment, Trial by Jury Clause

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, ..."

STATEMENT OF THE CASE

The Petitioner was indicted March 24, 1966, for first degree manslaughter under Ohio Revised Code Section 2901.06. On July 18, 1966, she withdrew her plea of

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not guilty and entered a plea of guilty.

At that time, she was represented by counsel and was carefully admonished by the court that a plea of guilty may waive constitutional rights, and that she "should not waive those rights unless it is in (her) own best interests to do so". On November 17, 1966, she moved to withdraw the plea of guilty and to enter a plea of not guilty. Eleven days later, on November 28, 1966, the trial Court over-ruled Petitioner's motion and sentenced her to the Ohio Reformatory for Women. Petitioner thereafter filed her appeal with the Court of Appeals of Cuyahoga County and thereafter with the Supreme Court of the State of Ohio, being unsuccessful in each of them.

Facts Material To The Consideration of The Questions Presented

The defendant is married and has three small children who were three, five and six years of age at the time the defendant was before the Trial Court. Her husband suffers mental illness. He was committed for three months to Cleveland State Hospital, being released in the Spring of 1965, and has been on continuous medication thereafter. The husband has a precarious hold on himself; he depends totally upon petitioner for all family decisions. He holds his job only because it requires practically no contact with people, except for an occasional telephone call.

Counsel for Petitioner explained to her, and she understood that in the event of trial, she would have to rely chiefly upon the testimony of her mentally ill husband.

At the time she entered her plea of guilty, Petitioner was convinced that putting her husband in the witness chair would snap the thin strand by which he retains his sanity, forcing his return to Cleveland State Hospital. Her plea of guilty was not an admission of guilt, but was made to preserve the sanity of her husband and for the overall best interests of her family.

It was her plan that, in the event of a prison sentence, the children be placed in the Parmadale Children's Village of St. Vincent de Paul, there being no one in her family or her husband's family to look after the little children of the parties.

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Subsequently she learned that Parmadale did not take children under six years of age and that her children would have to be separated.

Thereafter, upon reflection, she decided that her decision to plead guilty was unwise and, eleven days before imposition of sentence, she filed her Motion to Withdraw the said plea and to enter instead her plea of not guilty.

The federal questions raised in this Petition were raised in the Trial Court by exception and in the Cuyahoga County Court of Appeals and in the Supreme Court of the State of Ohio by assignment of error.

The Journal Entry made by the Common Pleas Court is as follows:

> "Motion to withdraw plea of guilty is overruled. Defendant is sentenced to the Ohio State Reformatory for Women and pay costs."
>
> "Defendant is continued on same bond pending appeal."
>
> H. R. Whiting, Judge
>
> November 28, 1966 ....."

The Journal Entry made in the Cuyahoga County Court of Appeals was as follows:

> "This cause came on to be heard on the appeal on Questions of Law from the judgment of the Court of Common Pleas, and was argued by counsel for the parties; and upon consideration of all of the errors assigned, the Court finds no error prejudicial to the appelant and therefore the judgment of the Court of Common Pleas is affirmed. It is ordered that appellee recover of the appelant its costs herein expended.
>
> It is further ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Appellant excepts".

The Journal Entry made in the Supreme Court of the State of Ohio was as follows:

> "This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no Motion to Dismiss such appeal having been filed, the Court sua sponte dismissed the appeal for the reason that no substantial constitutional question exists....."

REASONS FOR GRANTING THE WRIT

There is very little so repugnant to the principle of due process as coercion. Were the guilty plea entered by Petitioner made while under the coercion of a gun at her head, could such plea be considered a voluntary admission of guilt and could it be a waiver of

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constitutional rights?

The gun at the head of the Petitioner, when she entered her guilty plea, was the knowledge that were she to go to trial, her husband's sanity would snap, she would be left without support and the children without a father. On the other hand, were she to plead guilty as she did, the family could lose the mother but the husband's sanity would not be impaired. Thereafter, she learned that were she to be committed to prison, the family would face the further misfortune of separation of the children. It was then that she realized that she had elected to be impaled on the wrong horn of her dilemma.

We respectfully suggest to the Court that coercion which arises out of the peculiar circumstances facing a defendant, if sufficiently impelling, may make involuntary what appears to be a plea voluntarily entered in a criminal action; and under those circumstances, entering a plea of guilty is not a waiver of constitutional rights.

In a discussion of this subject matter, the text in 66 A.L.R. 828, reads as follows:

> "The Oklahoma Statute provides that 'the Court may, at any time before judgment, upon a plea of guilty, permit it to be withdrawn, and a plea of not guilty substituted'.
>
> The uniform holding of the Court in construing this Statute is that the defendant in a criminal action should be permitted to withdraw his plea of guilty, given inadvisedly, either before or after judgment, where any reasonable ground is offered for going to the jury; and, while this a matter within the discretion of the Court, the discretion is a judicial one which should always be exercised in favor of innocence and liberty." (citing cases)
>
> In Porter vs. State, 58 Okla Criminal Reports 54:
>
> "In our opinion the defendant should have been permitted under all the facts and circumstances to withdraw his plea of guilty when he applied for leave to do so. There is nothing to show that the Motion was not made in good faith, or that the entering of the plea and the Motion to withdraw it was intended for delay. A defendant should not be allowed to trifle with the Court by deliberately entering a plea of guilty and capriciously withdrawing it on the date set for pronouncing judgment, but when there is reason to believe that the plea has been entered from inadvertence, and without due deliberation, and mainly from the hope that the punishment may be thereby mitigated, the Court should be indulgent in permitting the plea to be withdrawn."

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In the above case, the defendant was represented by counsel.

The general rules are set forth in the following citations:

"Within the discretion of the Court, a plea of guilty may be withdrawn under certain conditions and a plea of not guilty entered. The law is not so technical as to regard the entry of a plea of guilty as a finality, especially when dealing with the life or liberty of a citizen....."
(15 Ohio Jurisprudence (2nd) 416, Criminal Law, Section 217.)

"The withdrawal of the plea of guilty should not be denied in any case where it is in the least evidence that the ends of justice will be subserved by permitting not guilty to be pleaded in its case....."
(16 Corpus Juris, 398, Section 730.)

"The least surprise or influence causing an accused to plead guilty when he has any defense should be sufficient grounds for permitting a change of plea from guilty to not guilty....." (21 American Jurisprudence (2nd) 497, Criminal Law, Section 505)

"The plea of guilty to a serious criminal charge should be freely and voluntarily made and entered by the accused without a semblance of coercion and without fear or duress of any kind and the accused should be permitted to withdraw a plea of guilty entered inadvisedly when application therefore is duly made in good faith and sustained by proofs and a proper offer is made to go to trial on a plea of not guilty..." (Clay v. State, 82 Florida 83; 89 So. 353)

"But while it is conceded that a change of plea rests in the discretion of the Court, such discretion should not be exercised arbitrarily, but should rest upon settled principles of justice, with a due regard to existing conditions. An abuse of discretion on the part of the trial court in this respect may result from failure to apply the principles of law applicable to a situation so that prejudice results to the accused..." (45 Ohio Jurisprudence (2nd) 415, Section 215)

The cases which generally hold against a defendant who seeks to change his plea, are almost without exception cases where the Court has already passed sentence. The Petitioner herein filed her Motion eleven days before sentence was handed down.

Giving the Petitioner her day in Court will in no manner prejudice the rights of the State of Ohio nor abridge the privileges of its citizens. Indeed, there will be no enlargement of rights and privileges, only their clarification.

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CONCLUSION

For each and all of the foregoing reasons, we respectfully suggest that Certiorari be granted.

Respectfully submitted,

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